From: Doug Skoglund
To: Department of Justice
Date: 1/21/02 2:57am
Subject: Microsoft Settlement

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To: microsoft.atr@usdoj.gov

Reference: Microsoft Settlement

In the Competitive Impact Statement, section I, Nature and Purpose of the Proceeding, I quote the following:

The Proposed Final Judgment will provide, certain and effective remedy for consumers by imposing injunctive relief to halt continuance and prevent recurrence of the violations of the Sherman Act by Microsoft that were upheld by the Court of Appeals and restore competitive conditions to the market.

Now, it doesn't take a legal genius to read the text of the Proposed Final Judgment and then have some serious doubt about the accuracy of the above statement. My review of the Revised Proposed Final Judgment, RPFJ, yields a great deal of confusion caused by questionable definitions, exceptions, loopholes and other assorted legal maneuvers that may or may not be relevant.

While I see the RPFJ as a great big expensive joke that does nothing for the micro-computer business nor for the larger society, as an ISV, Independent Software Vendor, I feel qualified to state that the RPFJ does nothing to limit the enormous power of Microsoft and its control over the business. While the object of these proceedings is the punishment of Microsoft for past anti-trust violations and prescription for future activity necessary to restore competition, one should never loose sight of the tremendous contribution Mr. Bill Gates and company have made to the development of the PC business.

Let me repeat, one should never loose sight of the tremendous contribution Mr. Bill Gates and company have made to the development of the PC business. With a few exceptions, most everyone in the business has operated within the shadow of Microsoft, which means that, in addition to the many benefits, we've also been aware of much of Microsoft's suspect activity, and we also were very well aware of the consequences of "whistle blowing". It should be understood that this general atmosphere of fear is more important in limiting competition than any of the overt activity that is the object of these proceedings.

I think that most people would recognize that the entire PC business has grown as a function of and in the image of Microsoft. But, it has outgrown even the imagination of Mr. Gates. It must be broken free to allow growth in areas and ways that may be contrary to his philosophy. Mr. Gates has done a remarkable job, we have made him a very rich man, but it is time for others to get into the game. It would be nice if Mr. Gates would allow the transition to occur peacefully, he should have negotiated a settlement with Judge Jackson long ago, but since he continues to resist the inevitable, it's up to you, Judge Kollar-Kotelly and you, Mr. Charles A. James.

I want to emphasize that this entire proceeding has suffered from non-participation by members of the PC business. I can imagine the personnel of the Department of Justice being more than a little piqued by the lack of qualified support from the industry. Yet it is easy to understand the reluctance of industry members to pitch in, what with careers on the line if the government lost this case. It would seem, when one views the complete capitulation of the Department of Justice, that the industry members have made the right choice.

If the Revised Proposed Final Judgment is accepted by the court, the people will have every right to conclude that Mr. Bill Gates and company are more powerful than the United States Government. Hey folks, you must not allow that to happen!!!!

Plaintiff Litigating States' Remedial Proposals

Plaintiff Litigating States' Opposition to Microsoft Corporation's Motion to Amend the Scheduling Order

Exhibits to Plaintiff Litigating States' Opposition to Microsoft Corporation's Motion to Amend the Scheduling Order

Now, here are three legal documents that I can understand. I refer to all three since each has a way of describing things that helps promote understanding. Not being a legal expert maybe it's something like programming, you need the program and then you need the documentation to explain what the program does and how to use it.

It would be far too easy to say that I support the Litigating States and end this document right here; however, I want to compare

my conclusions, as expressed in a previous post with the "Exhibits" conclusions on a couple of very key, to me, points.

One example: (my thoughts)

(From definition of Non-Microsoft Middleware Product) A Non-Microsoft Middleware product is any product that both meets the definition of Non-Microsoft Middleware and has at least one million copies distributed in the United States within the previous year...

...Without limitations on the definition, any software developer would be able to claim that any software product was middleware and thereby insist on exercising options and alternatives provided by the Proposed Final Judgment.

Correct me if I'm wrong, but it seems that I cannot expect protection from Microsoft illegal tactics against my "Middleware" application purely because it is new and therefore did not distribute one million copies last year.

(29) (from Exhibit)

the RPFJ's middleware definitions are drawn too narrowly, excluding from protection competitors of Microsoft in critical middleware markets and excluding from the restrictions of the judgment important Microsoft products -- for example, (a) software cannot qualify as a "Non-Microsoft Middleware Product" unless at least one million copies were distributed in the U.S. in the previous year, meaning that by definition nascent or developing middleware threats receive no protection under the user configuration flexibility remedy,...

Another Example: (my thoughts)

Subsection III.C.3. requires that Microsoft permit OEMs to configure their products to launch Non-Microsoft Middleware automatically at the conclusion of the first boot sequence...

The only limitation Microsoft may impose on OEMs in this circumstance is that any Non-Microsoft Middleware the OEM configures to launch automatically cannot display a user interface that is not of similar size and shape...

This really doesn't make much sense as the primary purpose for any competitive product might very well be to present a whole new user interface.

(10) (from Exhibit)

the RPFJ imposes unjustifiable qualifications in the provisions that appear to provide for flexibility in product configuration (e.g., (i) Microsoft can limit the addition of icons, shortcuts and menu entries for non-Microsoft products to only those places where Microsoft has decided to promote a Microsoft product with similar functionality (thus blocking such additions if Microsoft does not make that decision and/or does not offer a competing product), and (ii) the automatic launching of competing software may be prohibited if such software displays a user interface that is not of a similar size and shape to the interface displayed by the equivalent Microsoft Software or a Microsoft product would not otherwise launch automatically)

Critique of Remedial Proposals

I don't pretend to have the knowledge and expertise to critique the legal aspects of this document. I do, however, have substantial engineering background and programming experience to allow me to comment on some portions of the document and to emphasize things that I perceive to be logical shortcomings.

Definitions

This section may appear at the rear of a legal document; however, since all else depends on proper definitions, I want to discuss this subject first.

"Applications" - Programs that perform specific tasks, such as accounting, word processing, or communications or any other task that the user might require from a computer. Applications connect to the operating system by accessing or calling APIs.

"API" or "Application Programming Interface" - Program elements, routines or sections of program code that are callable or otherwise accessible by other program elements and/or applications for the purpose of performing specific steps or portions of a task. Since one API can call other APIs they may range from the very simple to the very complicated, but, it should be emphasized that APIs are never accessed by end users. (Some method of controlling acceptability of APIs is required - see some of the discussion below)

"Operating System" - Program that controls the low level processes of a computer and mediates between the application program and the drivers that control the computer hardware. The operating system schedules and controls the use of the system's hardware resources. These hardware resources may include memory, disk drives, printers, and CRTs. The goal of a good operating system is to simplify the use of the computer by providing a common set of practical, easy-to-use commands (APIs) that bridge the gap between the application programs and the actual physical processing of the computer.

"Middleware" - A non-Microsoft application that, in addition to performing specific tasks, exposes its own APIs for use by application developers. For the purpose of these proceedings, the definition of middleware must necessarily be short and specific. If one does a search of the Internet, one will find that the term has many meanings, and thus becomes meaningless for legal purposes. In addition, Microsoft should not be allowed to use the term to describe any Microsoft software because that only clouds the issue of ownership or source of a specific API. In other words, all APIs that Microsoft chooses to release should be considered part of the operating system.

"Interpreter" - An application that can perform specific tasks under control of a separate document or script. Basic started as an interpreted language, but with the development of compilers, that Basic script is generally converted into a binary coded program. Internet Explorer, Netscape Navigator and Java are more properly classified as Interpreters. Since a script can only give instructions to an interpreter, I suppose that Java might be called middleware if the script is compiled into a program that is actually run and then calls APIs itself. The distinguishing characteristic is determined by which segment is executed under the control of the computer's central processing unit, cpu.

"Operating System Product" - This is actually a collection of files that make up the Operating System, some associated applications and other related files. Since the basic operating system is useless to the user, some applications must be included, thus the need for this definition. And since Microsoft has chosen to obfuscate the meaning of operating system by it's philosophy of "integration", it has become necessary for the court to decide the meaning of this term and control it's future usage.

I don't intend to rewrite all the definitions, but, if one accepts the above definitions, one can readily visualize the impact on the balance of the court proceedings. Let's look at some interesting information, developed by installing various Microsoft operating systems, in turn, on the same machine.

MS-DOS version 6.22	130 files	2 directories
Windows for Workgroups version 3.11	418 files	4 directories
Windows 95	777 files	87 directories
Windows 98	1951 files	227 directories

Sorry, Windows XP would not install on this machine since it requires 64 Mb memory and this machine only had 32 Mb and an additional 32 Mb would have cost $100. (there's a limit to my contribution to these proceedings) Besides, these numbers allow me to make my point. Microsoft should have settled these anti-trust matters years ago and they would have been able to pursue business without governmental interference. Instead they chose to fight and they lost. Legally, they are a monopoly and they have violated the law. Their unwillingness to settle on reasonable terms necessitate that they become a regulated monopoly. They must be required to document all those files and directories so that a base point can be established to firm up the meaning of "Operating System Product". Future additions to the basic definition must be controlled by some kind of regulating body.

Using the above definitions, MS-DOS is an operating system, Windows for Workgroups might have been classified as an application because the machine was booted in MS-DOS and W4W was run separately; however, since it exposes APIs and is a Microsoft product it thus becomes an operating system. Windows 95/98/2000/XP are operating systems (after determination of a base point) because the machine is booted directly into the respective system.

If we use Windows 95 to determine the base point, Internet Explorer, an application by definition, is not part of the operating system since it was introduced separately and then included with Windows 98.

In summary, Microsoft lost the right to "integrate applications into the operating system", by violating the law. If not this, then other application developers deserve the right to have their similar applications integrated into the operating system also.

Mandatory Disclosure to Ensure Interoperability

This section of the Remedial Proposals needs considerable work in that it fails to recognize the existence of Microsoft Development Network, MSDN, and more importantly, it fails to deal with the quality of such disclosure. It should be understood that Microsoft distributes all (I think) technical information to subscribers dependent upon subscription level. In other words, you purchase the level of information you require, no matter your other relationship to Microsoft. I see this as satisfactory, if the court determines that Microsoft personnel also use the MSDN documentation. The difficulty with the present system is the method of developing APIs. It is obvious to developers using MSDN that many APIs were developed for Microsoft application use and then documented and added to MSDN. This, of course, means that Microsoft personnel have been using the API for considerable time before outsiders have had access.

A well controlled monopolist should be expected to develop APIs for broad usage and let inside programmers determine usage the same as outside ones. The broad usage requirement should be interpreted to mean that the basic lowest level API must be documented. I quote from "MFC Programming with Visual C++ 6 Unleashed", copyright 1999 by Sams Publishing.

The Microsoft Foundation Classes are an excellent example of how an object-oriented approach to packaging software functionality can lead to code reuse, reduced application complexity, and in the end, a more efficient software development environment.

MFC has been around for seven years now. The first version of MFC was release with version 7 of Microsoft's 16-bit C/C++ compiler, and it represented little more than a wrapper around the Window GDI (Graphics Device Interface) call.

The author goes on to emphasize the benefits of MFC to the programmer and de-emphasize the costs to the ultimate user. Programs, including code stored in associated files, are larger (amount of memory required) and operate slower. Microsoft has developed additional features/dialects (?) such as COM, ATL, .NET aimed at the benefits to the programmer without much consideration for the user, after all, additional memory and disc space is cheap and faster computers are being developed all the time. Microsoft has tended to use these higher level approaches in their applications, and then document the higher level APIs. If the propose of these proceedings is to restore competition, Microsoft must be forced to document the entire structure of a higher level API, which means that the basic API should be demonstrated in a sample program written in C/C++ without all the frills. As a matter of fact, the sample program should be capable of compiling with a competitive compiler.

One should be aware of the hidden advantage Microsoft accrues with this programming philosophy. The more an individual programmer and a programming organization ties itself to MFC and these other dialects the more "locked in" they become and the more their programs look and feel like Microsoft programs. True competition with Microsoft can only occur at the basic API level.

Internet Browser Open-Source License

This provision is unnecessary since the Browser APIs are now available through MSDN. What is required, however, is more control over the size of acceptable segmentation. Any programmer could take a complete application, enclose it in a DLL, dynamic link library, set up the call linkage and then call it from a skeleton application. The application now becomes middleware; but, the purpose has been compromised. Calling the resultant API would be no different than running the original program. The segmentation, must be small enough to allow another programmer to use some of the APIs to build a distinctly different application.

What is needed about Internet Explorer is better segmentation. For example, there is an API, Navigate, part of Web Browser Control, that includes both the access to a web page and the display of that web page. The net effect of this shortcoming is to prevent a programmer from controlling the access to the Internet. In other words, use of this API might very well allow Microsoft to include Internet access desired by Microsoft without the users, or the programmers knowledge. Oh, Microsoft might argue my point as some of the Internet calls are available for examination; however, they will have to explain why *ALL* of the calls are not available.

Internal Compliance

The Remedial Proposal devotes considerable words to the subject of compliance including the appointment of a Special Master. I only wish to add to these recommendations by pointing out a way of developing a measurement mechanism that can be used to establish goals and measure progress towards those goals, assuming that the big broad general goal is to improve service to the customer.

The philosophy is simple; - execution, well, that may be another thing. A proper amount of "encouragement" from the court should turn the trick.

All that is required is a monitored, measured, Internet support forum/s. There are all kinds of forums and chat groups on the Internet right now, some monitored, others unmonitored. I am speaking about monitoring by qualified, empowered, personnel, qualified to answer many questions and empowered to get answers from more qualified personnel if necessary.

But, far more important is the measurement mechanism. Since each request/question/complaint is a single document, it can be classified by the submitter, dated and timed by the computer. The response can be classified by the respondent, dated and timed by the computer. The software can then keep track of response times, quantities entered, closed and still open, by category, on a daily, weekly or monthly basis. This type of system could replace the Periodic Reports called for in the Remedial Proposal.

Windows Operating System Licenses

Mandatory Disclosure to Ensure Interoperability

Intellectual Property Rights

These sections seem to be unnecessarily complicated, using terms like OEM, Covered OEM, Third-Part Licensee, which are all meant to exclude. I would think that subscription to MSDN could be the sole determinant controlling licensing and the distribution of technical information. Subscription to MSDN at the Operating System level or above should include one copy of each current operating system with the right to purchase, and re-sell, additional copies according to a discount schedule based upon yearly quantity. Many computers are assembled by small companies that should be able to re-sell licenses to the operating system.

In addition, a "fair use" type of clause should be required in software licensing that would permit installation on multiple machines used by a single or limited number (family) of individuals. Most companies allow this since enforcement is very difficult, but Microsoft has chosen to restrict this kind of use with very intrusive procedures. I recognize that this might be a matter for Congress, but, I wanted to bring up the subject anyway.

Under the title of "Equal Access", Microsoft is allowed to restrict access to information about any bona fide joint development effort. I would think that joint development efforts should be restricted to applications only and even then be under very strict control. This exception is too large a loop hole to be allowed a monopoly.

Obviously the structure and pricing of MSDN should be controlled by the court.

Respectfully submitted:

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P.S. Bill Gates is wrong, wrong, wrong, wrong, wrong!!!!!!!!!! Have I got your attention????????

First, I don't pretend to be some sort of all knowing guru with the things that I have written or will write. I do, however, claim to be pretty good at distilling the wisdom out of things that other people have said and written. Let me illustrate: The following from a column by Jim Rapoza titled "Microsoft Still Suffers Insecurity Complex", posted on eWeek web site, January 7, 2002.

When Microsoft introduced active content in Outlook, we, along with many in the security community, said it would create a security risk. But Microsoft blew these warnings off as theoretical and, instead, touted the gains that would be made by

making mail more automatically responsive...

...I think that worries about potential security risks will always be pushed aside to make way for latest cool, new feature.

True, Jim, but one might say that Microsoft knows what sells.

Next, let me set the framework for further discussion. I can imagine that most every business person has contemplated the question of honesty vs. success. She/he discovers very early that when a business is small, fighting for survival, total and complete honesty will get you nowhere. Growth requires aggressive action to get that next larger contract or chunk of business. And that aggressive action means the acceptance of a few small lies (or information not disclosed). I'll bet that the early relationship between Microsoft and IBM had its share of less than 100% honesty.

I don't need to beat the honesty point to death, except to say that we will get disagreement all over the place before we settle down and except the wisdom of the above.

The point that is missing is that the requirement for honesty increases with success, and that is the critical point that Bill Gates has missed. He continues to act as though he believed that strategy as a successful company must be the same that was necessary to become successful.

Of course, boiling this all down to honesty is far too simple. That's the reason for using the security example above. During the growth process, it's the cool, new feature that sells. What Bill Gates fails to recognize and that Jim Rapoza, as one member of the business, is saying is, "Microsoft, it's time to truly start considering the needs of your customers. Security is important, and you can't continue to ignore the warnings".

To emphasize my point, I think that we have to see these anti-trust proceedings for what they really are. Most people would concede that Bill Gates could have settled this whole thing a few years back and that Microsoft would be free to conduct business without much governmental interference. Remember, the anti-trust laws exist to protect the consumer and that the government really does represent the people. The government had to step in because Mr. Gates failed to transition his company from aggressive corporate fighter to good corporate citizen. He has had all kinds of notice, if he had only mined the wisdom from the words of his critics instead of viewing everything through his paranoid tinted glasses.

As a matter of fact, Mr. Gates can still wake up and settle this matter, but he must allow the government to win. There is no question that Microsoft has the power and resources to beat the government in the short run, but Mr. Gates must recognize that he is really flipping the finger at the consumer if he does. Remember, the government is us, the people, the consumers. I suspect that we will get the last laugh over a longer period of time.

Since settling as spelled out in the RPFJ is a win for Microsoft, the settlement must be according to the Plaintiff Litigating States' Remedial Proposals, with my revisions, of course. There is nothing in these proposals and revisions designed to hurt Microsoft. On the contrary, they are only detailing changes necessary for Microsoft to become a good corporate citizen. All of these things should have been incorporated by Microsoft over the years in what should have been a natural transition to a more honest, ethical operation.

One final point, the market wants a single, stable, reliable, secure operating system, under the control of a strong, honest, ethical, reliable monopoly. True competition in applications requires nothing less. Microsoft could fill that need; however, past performance indicates that the Microsoft monopoly needs to be regulated. The Department of Justice, the litigating Attorneys General and the Courts must get that point across to Mr. Bill Gates and company.

The previous does not mean that there is not room for other operating systems. There will always be niches open to other approaches and nothing to stop alternatives from out-performing the established monopoly. After all, the non-monopolies have more freedom of action. That, of course, is the idea behind controlling a monopoly.

Do I have a dog in this fight?? -- You betcha!!

Of course, I have a vested interest in the outcome of these proceedings, but then, who doesn't?? I believe that my Personal Digital Multimedia ScrapBook, PDMSB, is an application that is built upon an engine that, in the hands of Microsoft or a competitor, could open a whole new generation of application development on the desktop. The RPFJ contains exclusions that would inhibit the growth of this engine as a true contender; however the Remedial Proposals seem to provide protection for any potential competitor.

I said previously that Bill Gates was wrong. His present emphasis on the Internet seems to have left the industry with the attitude

that Microsoft owns the Desktop and that further development in this area is over. Wrong, the Internet, while very important, will never replace the Desktop in the minds of the average user. After all, the whole (DeskTop) is equal to the sum of its parts (Internet activity vs. Local activity). I repeat, the PDMSB engine in the hands of someone like AOL Time Warner, for example, could open a whole new generation of application development on the desktop.

Because PDMSB is still a work in process, the basic software has been available at http://www.pdmsb.com for some four years, while copies of various contact attempts have been available at http://www.ifihadmyway.com. If anyone would like an interesting view of the status of the PC business I would suggest interviewing some of addressees of those contact attempts, (under oath, maybe?).

Obviously, Microsoft has every right to make incorrect decisions. The difficulty comes from the fact that as the monopoly supplier of the dominant operating system, the entire industry is dragged in a direction they may not want to go. Just as the Remedial Proposals require Microsoft to support old versions of operating systems, MSDN must be required to support the basic APIs to allow application developers to develop competitive applications.

Whether I'm right or wrong is of no matter, what does matter; however, is that present Microsoft dominance prohibits open debate of my and/or many other ideas. Of course, I want to sell my software, but I'm just small potatoes, how many others might have a dog in this fight also?? Even the top management of AOL Time Warner were unwilling to investigate my proposals. I would hope that the business could be more open than that. Rejection after evaluation is one thing, being ignored is another!!